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Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*")

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I. Preface

1. At its fifty-sixth session, in 2004, the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work.[1] The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission's report concerning its long-term programme of work. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission's current programme of work and decided to include the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" on its agenda, and appointed Mr. Zdzislaw Galicki as the Special Rapporteur for this topic.[2]

2. The topic in question appeared in the list of planned topics already at the first session of the International Commission in 1949, but was largely forgotten for more than half a century until it was briefly addressed in articles 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. These articles set out minimum contours of the principle of *aut dedere aut judicare* and the linked principle of universal jurisdiction. It is important to remember that the Draft Code was largely a codification exercise of customary international law as it stood in 1996, as confirmed two years later with the adoption of the Rome Statute of the International Criminal Court, rather than a progressive development of international law.

3. The text presented below has been prepared by the Special Rapporteur as a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further considerations and including a very general road map for the future work of the International Law Commission in this field.

II. Introduction

4. The formula "extradite or prosecute" (in Latin: "*aut dedere aut judicare*") is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, "... which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct".[3]

5. As it is stressed in the doctrine, "the expression 'aut dedere aut judicare' is a modern adaptation of a phrase used by Grotius: 'aut dedere aut punire' (either

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[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 362; for the syllabus on the topic, see the annex to the Supplement.

[2] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

[3] M. Cherif Bassiouni, E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dortrecht/Boston/London: Martinus Nijhoff Publishers, 1995), at p. 3. A rich collection of "International Criminal Law Conventions Establishing a Duty to Extradite or Prosecute" has been gathered, classified into numerous categories and commented on by those two authors, op. cit., pp. 75-302. It may be a good starting point for the further work of the International Law Commission.

extradite or punish)".[4] It seems, however, that for applying it now, a more permissive formula of the alternative obligation to extradition ("prosecute" (*judicare*) instead of "punish" (*punire*)) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured.

6. A modern approach does not seem to go so far as Grotius did, taking also into account that an alleged offender may be found not guilty. Furthermore, it leaves without any prejudice a question if the discussed obligation is deriving exclusively from relevant treaties or if it also reflects a general obligation under customary international law, at least with respect to specific international offences.

7. There are also some other formulas applied by the doctrine to describe the obligation in question, such as, for example, "*judicare aut dedere*" or "*aut dedere aut prosequi*",[5] or even "*aut dedere, aut judicare, aut tergiversari*".[6] At the enforcement level, there is also the option of the enforcement of foreign criminal sentences under the principle *aut dedere aut poenam persequi*.[7]

8. It was also noted by some authors that it is necessary to distinguish between the principle of universal jurisdiction and the principle *aut dedere aut judicare*. According to their opinion:

> "The latter expression is essentially a modern adaptation of the phrase aut dedere aut punire used by Grotius in De Jure Belli ac Pacis to describe a natural right of an injured state to exact punishment, either by itself or by the state hosting the suspect (...). The modern expression, however, seems to suit the contemporary meaning better, as it does not, strictly speaking, imply an obligation to 'punish' but rather to adjudicate or prosecute, or even just to 'take steps towards prosecution'."[8]

The question of mutual relationship between the two said principles will meet its preliminary considerations in part IV of the present report. A full analysis of the link between the principle of universal jurisdiction in criminal matters and the principle *aut dedere aut judicare* should have, without any doubt, an important place in the future work of the International Law Commission on the present topic.

9. Although the obligation to extradite or prosecute may look, at first, as a very traditional one, we should not be misled, however, by its ancient, Latin formulation. The obligation to extradite or prosecute cannot be treated as a traditional topic only.

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[4] Ibid., p. 4. See also Hugo Grotius, *De Iure Belli ac Pacis*, Book II, chapter XXI, paras. III and IV; English translation: *The Law of War and Peace*, Classics of International Law (F. W. Kelsey translation, 1925), pp. 526-529.

[5] See G. Guillaume, "*Terrorisme et droit international*", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 215 (1989-III), p. 287, who said at p. 371 that « Dès lors la véritable option qui s'ouvre aux Etats est nécessairement *aut dedere, aut prosequi*. » ("true option which is open to States is necessarily *aut dedere aut prosequi*").

[6] What freely translated means "to hand over, to prosecute, or to shuffle and find excuses". See K. R. Fisher, "In Rem Alternatives to Extradition for Money Laundering", *Loyola of Los Angeles International and Comparative Law Review*, vol. 25, p. 409, at p. 412.

[7] M. Plachta, "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*", *European Journal of International Law*, vol. 12 (2001), p. 131.

[8] N. Larsaeus, "The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers", *Nordic Journal of International Law*, vol. 73 (2004), pp. 69-97.

Its evolution from the period of Grotius up to recent times and its significant development as an effective tool against growing threats arising for States and individuals from criminal offences can bring us easily to one conclusion — that it reflects new developments in international law and pressing concerns of the international community.

10. The International Law Commission, which has incorporated the *aut dedere aut judicare* rule in the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code of Crimes),[9] simultaneously has explained the principle and its rationale as follows:

> "The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of 'an individual alleged to have committed a crime'. This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information."[10]

11. The International Law Commission noted that the duty either to prosecute or extradite would depend on the sufficiency of the evidence, although it noticed simultaneously that:

> "The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition."[11]

12. Recognizing the importance of the principle concerned for the effective operation of extradition, l'Institut de Droit International at its session in Cambridge, England, in 1983 adopted the resolution on "New Problems of Extradition", which contained part VI entitled "*Aut judicare aut dedere*", stating in paragraph 1 that:

> "The rule *aut judicare aut dedere* should be strengthened and amplified, and it should provide for detailed methods of legal assistance."[12]

13. It was underlined in the doctrine that to determine the effectiveness of the system based on the obligation to extradite or prosecute three problems have to be addressed:

> "first, the status and scope of application of this principle under international law; second, the hierarchy among the options embodied in this

[9] See para. 24 below for the text of appropriate article 9 of the Draft Code.

[10] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II, 1996 Draft Code of Crimes, commentary to article 9, para. 3.

[11] Ibid., paras. 4 and 5 of the commentary on article 9.

[12] Resolution of 1 September 1983.

rule, provided that the requested state has a choice; third, practical difficulties in exercising judicare".[13]

14. Such practical difficulties and obstacles exist, as it seems, equally in the field of *dedere and judicare*. The serious weaknesses in the current system of extradition and mutual legal assistance derive, to a great extent, from the outdated bilateral extradition and mutual legal assistance treaties. There are numerous grounds of refusal which are not appropriate when crimes under international law are concerned, but there are also important safeguards that often are missing regarding the extradition of persons to countries where they would face unfair trials, torture or the death penalty.[14] On the other hand, there are also numerous obstacles to the effectiveness of prosecution systems that are not appropriate to such crimes, including statutes of limitation, immunities and prohibitions of retrospective criminal prosecution over conduct that was criminal under international law at the time it occurred.

15. It also seems necessary to find out if there is any hierarchy of particular obligations which may derive from the obligation to extradite or prosecute, or is it just a matter of discretion of States concerned.

III. Universality of suppression and universality of jurisdiction

16. In particular, the obligation to extradite or prosecute during the last decades has been included in all, so-called sectoral conventions against terrorism, starting with the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, on 16 December 1970,[15] which states in article 7:

> "The Contracting State in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

17. As noted in the doctrine, two variants of The Hague Convention formula can be identified:

> "a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a state has elected to authorize the exercise of extraterritorial jurisdiction;

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[13] M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", *Maastricht Journal of European and Comparative Law*, vol. 6 (1999), No. 4, p. 332.

[14] Interesting observations on "Aut Dedere aut Judicare *as a Solution*" in confrontation between the tendency to suppress international crimes and the protection of basic human rights have been made by J. Dugard and Ch. van den Vyngaert in "Reconciling Extradition with Human Rights", *American Journal of International Law*, vol. 92, No. 2 (April 1998), pp. 209-210.

[15] United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

"b) the obligation to submit a case for prosecution only arises when a request for extradition has been refused."[16]

Both of them are reflected in subsequently concluded universal and regional conventions against various kinds of international or transnational crimes.

18. Through such a formulation, as contained in the 1970 Hague Convention, the obligation in question has been significantly strengthened by combining it with the principle of universality of suppression of appropriate terrorist acts. The principle of universality of suppression should not be identified, however, with the principle of universality of jurisdiction or universality of competence of judicial organs. The universality of suppression in this context means, as a result of application of the obligation to extradite or prosecute between States concerned, that there is no place where an offender could avoid criminal responsibility and could find so-called safe haven.

19. There are various descriptions of the concept of universal jurisdiction in criminal matters. One of them which seems practicable describes universal jurisdiction as:

"the ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed outside the State's territory which are not linked to that state by the nationality of the suspect or of the victim or by harm to the state's own national interests".[17]

20. Consequently, crimes subject to universal jurisdiction — according to the authors of the definition quoted above — would fall into the following three categories:

"(1) **Crimes under international law**, such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions and 'disappearances';

"(2) **crimes under national law of international concern**, such as hijacking or damaging aircraft, hostage-taking and attacks on diplomats; and

"(3) **ordinary crimes under national law**, such as murder, abduction, assault and rape."[18]

21. On the other hand, a concept of the principle of universal jurisdiction and competence, especially in later years, is often connected with the establishment of international criminal courts and their activities. In practice, however, the extent of such quasi-universal "jurisdiction and competence" depends on the number of States accepting the establishment of such courts and is not directly connected with the obligation to extradite or prosecute. It has to be stressed, however, in order to avoid misunderstandings, that although international criminal courts exercise international jurisdiction of varying geographic reach, including universal one, it should not be treated as universal jurisdiction as defined above, which is a form of jurisdiction

[16] M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", supra note 13, at p. 360. By way of example, the following conventions may be mentioned: with respect to variant a) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, article 6, para. 9; and with respect to variant b) the European Convention on the Suppression of Terrorism of 1977, article 7.

[17] Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Introduction, p. 1.

[18] Ibid.

exercised only by States. The two types of jurisdiction are usually seen as complementary, but of an entirely different nature.

22. It seems inevitable, when analysing various aspects of the applicability of the obligation to extradite or prosecute, to trace the evolution of the principle of universality of jurisdiction from its traditional perception to the provisions of the Rome Statute of the International Criminal Court of 17 July 1998. Looking at this evolution, an interesting example of one of the earliest attempts to analyse the phenomenon of universal jurisdiction may be found in the Draft Convention on Jurisdiction, prepared in 1935 by the Research in International Law under the auspices of the Harvard Law School.[19] Two articles were included, dealing with the problem in question: article 9 entitled "Universality — Piracy" and article 10, entitled "Universality — Other crimes". The latter article provided that:

> "A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in articles 6, 7, 8 and 9,[20] as follows:
>
> "(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.
>
> "(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which he is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national."[21]

23. The above-quoted formula combines elements of the universal jurisdiction of a State with the jurisdictional powers of a State based on principles of territoriality and nationality, as well as the additional element of the alternative possibility of extradition ("surrender"), what can be considered as a reflection of the principle of *aut dedere aut judicare*. However, the whole construction of these provisions seems to be aimed at the right of a State to extradite or prosecute rather than the obligation to do so.

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[19] See, "Draft Convention on Jurisdiction with Respect to Crime", prepared by the Research in International Law under the auspices of the Harvard Law School, in *American Journal of International Law Supplement*, vol. 29 (1935), p. 436.

[20] "Crimes mentioned" in the said articles included such crimes as those concerning "security of the State", "Counterfeiting", "Piracy", as well as crimes committed outside the territory of a State by an alien "in connection with the discharge of a public function which he was engaged to perform for that State" or "while engaged as one of the personnel of a ship or aircraft having the national character of that State".

[21] See supra note 19, at pp. 440 and 441.

24. In the realm of prior codification, the obligation in question may be found in article 9, entitled "Obligation to extradite or prosecute", contained in the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session, in 1996.[22] This article states as follows:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual."[23]

25. Simultaneously, article 8 of the Draft Code, entitled "Establishment of jurisdiction", requires each "State Party" to:

> "... take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed".

In the commentary to this article the International Law Commission stated:

> "Jurisdiction over the crimes covered by the Code is determined in the first case by international law and in the second case by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of 'universal jurisdiction' set forth in article 9. The phrase 'irrespective of where or by whom those crimes were committed' is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes."[24]

26. Although the International Law Commission did not use the term "universal jurisdiction" in draft article 9, the above-quoted commentary expresses the opinion of the Commission that, at least in terms of the list of "crimes under international law" (i.e. genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes) contained in articles 8 to 9, it considers them as being subject to "universal jurisdiction". Similarly, the Commission recognized that the same crimes are also subject to the obligation of *aut dedere aut judicare*.

27. It is interesting, however, that when the concept of the obligation to extradite or prosecute was introduced in the Draft Code by then Special Rapporteur, Mr. Doudou Thiam, for the first time in 1986, the draft article concerned was entitled "Universal offence" and provided for the duty of every State "... to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory".[25]

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[22] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II.

[23] These are such crimes as "Crime of genocide", "Crimes against humanity", "Crimes against United Nations and associated personnel" and "War crimes".

[24] See supra note 22, para. 7 of the commentary.

[25] See article 4, Fourth report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, *Yearbook of the International Law Commission, 1986*, vol. II (Part One), document A/CN.4/398, p. 83.

28. The next year the title of the article concerned was changed by the Special Rapporteur, to "*Aut dedere aut punire*".[26] Once again, the formulation of the obligation was modified to "obligation to try or extradite"[27] when adopted on first reading, before it reached its final form (extradite or prosecute) in the above-quoted Draft Code finally adopted by the International Law Commission in 1996.

29. An analogous formulation, although limited to specified "crimes against diplomatic agents and other internationally protected persons", was used in article 6 by the International Law Commission, when elaborating the "Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons" in 1972.[28] The principle *aut dedere aut judicare* is reproduced without change in article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the United Nations General Assembly on 14 December 1973.[29]

30. In the above-quoted practice of the International Law Commission it is clearly visible that the principle *aut dedere aut judicare* went through a kind of evolution, both as it concerns its form and content. This evolution may be helpful now for a decision to be taken by the Commission as to the final formulation of the obligation to extradite or prosecute. It would seem especially important to establish whether the most common translation of *judicare* should be retained or perhaps be replaced by "try" or "adjudicate".

IV. Universal jurisdiction and the obligation to extradite or prosecute

31. A close and mutual relationship between these two institutions has been noted and stressed in a well-known legal memorandum prepared by a non-governmental organization:

> "There are two important related, but conceptually distinct, rules of international law. **Universal jurisdiction** is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. Sometimes this rule is called permissive universal jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. (...) Under the related **aut dedere aut judicare** (extradite or prosecute) rule, a state may not shield a

[26] *Yearbook ..., 1987*, vol. II (Part One), p. 3.

[27] *Article 6 (Obligation to try or extradite)*: 1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him. See: *Yearbook ..., 1988*, vol. II (Part Two), p. 66; also later: *Yearbook ..., 1994*, vol. II (Part One), p. 102.

[28] *Article 6*: The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

[29] General Assembly resolution 3166 (XXVIII), annex.

person suspected of certain categories of crimes. Instead, it is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court."[30]

32. During the discussion held in the Sixth Committee of the General Assembly at its sixtieth session, in 2005, some delegations, welcoming the inclusion of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" expressed the view that:

> "... the analysis of this topic should take into account the principle of universal jurisdiction in criminal matters. The growing practice, especially in recent years, of including the obligation to extradite or prosecute in numerous international treaties and its application by States in their mutual relations raised the question of unification of different aspects of the operation of that obligation. Among the most important problems requiring urgent clarification was the possibility of recognizing the obligation in question not only as a treaty-based one but also as one having its roots, at least to some extent, in customary rules."[31]

33. A direct link existing between the institution of universal jurisdiction and the obligation to extradite or prosecute was also stressed by many scholars:

> "Treaties setting out a regime of 'universal jurisdiction' typically define a crime and then oblige all parties either to investigate and (if appropriate) prosecute it, or to extradite suspects to a party willing to do so (...). This is the obligation of *aut dedere aut judicare* (either extradite or prosecute)."[32]

34. Not all of the authors are, however, in agreement as concerns the application of the principle (and obligation!) of *aut dedere aut judicare* to all crimes covered by the principle of universal jurisdiction. As summarized by one scholar:

> "The suggestion (...), that the principle of aut dedere aut judicare would apply to all universally condemnable crimes as a matter of customary international law, or the theory (...) that the principle would, in some cases, even amount to an erga omnes obligation are, however, both extreme positions. While I have not found enough evidence to support such an obligation, I would not rule out that the principle may have reached customary status with regard to some conventions, or even groups of conventions."[33]

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[30] Amnesty International, supra note 17, chap. 1, p. 11.

[31] See A/CN.4/560, para. 243.

[32] B. Broomhall, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law", *New England Law Review*, vol. 35 (2001), p. 401.

[33] N. Larsaeus, supra note 8, at p. 91.

V. Sources of the obligation to extradite or prosecute

A. International treaties

35. A preliminary task in future codification work on the topic in question would be to complete a comparative list of relevant treaties and formulations used by them to reflect this obligation. Some attempts have already been made in the doctrine, listing a large number of such treaties and conventions.[34] These are both substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States.

36. In examining those treaties it will be necessary to look closely at least at the provisions of international criminal law conventions establishing a duty to extradite or prosecute, dealing — as listed in the doctrine — with such matters as:

> "(1) the prohibition against aggression, (2) war crimes, (3) unlawful use of weapons, (4) crimes against humanity, (5) the prohibition against genocide, (6) racial discrimination and apartheid, (7) slavery and related crimes, (8) the prohibition against torture, (9) unlawful human experimentation, (10) piracy, (11) aircraft hijacking and related offences, (12) crimes against the safety of international maritime navigation, (13) use of force against internationally protected persons, (14) taking of civilian hostages, (15) drug offences, (16) international traffic in obscene publications, (17) protection of national and archaeological treasures, (18) environmental protection, (19) theft of nuclear materials, (20) unlawful use of the mails, (21) interference with submarine cables, (22) counterfeiting, (23) corrupt practices in international commercial transactions, and (24) mercenarism."[35]

This catalogue, though intended to cover all categories of treaties concerned, has become non-exhaustive, not including — for instance — the most recent counter-terrorism treaties, as well as conventions on the suppression of various international or transnational crimes.[36]

37. Another catalogue of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations is contained in an above-quoted memorandum prepared by Amnesty International. It includes 21 conventions concluded during the period 1929-2000, which are considered by the authors of the said memorandum as the most representative for the question of universal jurisdiction and *aut dedere aut judicare* obligations. These are the following instruments:[37]

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[34] M. Cherif Bassiouni, E. M. Wise, supra note 3, pp. 75-302; also *Oppenheim's International Law* (9th ed., R. Jennings and A. Watts, editors, 1992), vol. 1, pp. 953 and 954.

[35] M. Cherif Bassiouni, E. M. Wise, supra note 3, at p. 73.

[36] See, for example, the United Nations Convention against Transnational Organized Crime, Palermo, 2000, and Protocols thereto, or the International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 2005. See also, the Council of Europe Convention on the Prevention of Terrorism, Warsaw, 2005, which in article 18 provides for the obligation to "Extradite or prosecute", although it does not deal directly with acts of terrorism but only with offences connected with terrorism.

[37] See Amnesty International, supra note 17, chap. 15, p. 18.

(1) 1929 International Convention for the Suppression of Counterfeiting Currency; (2) Geneva Conventions of 1949; (3) 1958 Convention on the High Seas; (4) 1961 Single Convention on Narcotics Drugs; (5) 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; (6) 1971 Convention on Psychotropic Substances; (7) 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (8) 1972 Protocol Amending the Single Convention on Narcotics Drugs, 1961; (9) 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*; (10) 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; (11) 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; (12) 1979 International Convention against the Taking of Hostages; (13) 1980 Convention on the Physical Protection of Nuclear Material; (14) 1982 United Nations Convention on the Law of the Sea; (15) 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (16) 1988 Convention for the Suppression of Unlawful Acts against Maritime Navigation; (17) 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries; (18) 1994 Convention on the Safety of United Nations and Associated Personnel; (19) 1997 International Convention for the Suppression of Terrorist Bombings; (20) 1999 International Convention for the Suppression of the Financing of Terrorism, and (21) 2000 United Nations Convention against Transnational Organized Crime.

38. It seems that the existing treaty practice, significantly enriched during the last decades, especially through various conventions against terrorism and other crimes threatening the international community, has already created a sufficient basis for considering the extent to which the obligation to extradite or prosecute, so important as a matter of international criminal policy, has become a matter of concrete legal obligation.

39. Moreover, several treaties (for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) compel States parties to introduce rules to enforce the *aut dedere aut judicare* principle, according to which the State which does not order extradition is obliged to prosecute. Similarly, under international humanitarian law, States have the obligation to look for and prosecute those alleged to be responsible for grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I of 1977 or otherwise responsible for war crimes, and to prosecute such persons or extradite them for trial in another State. States will therefore have to set up appropriate mechanisms to ensure the effective enforcement of this principle, as well as to ensure more generally an effective framework for judicial cooperation with other States in these matters.

B. International custom and general principles of law

40. One of the crucial problems which has to be solved by the International Law Commission during the elaboration of principles concerning the obligation to extradite or prosecute will be, without any doubt, to find a generally acceptable answer to the question if the legal source of the obligation to extradite or prosecute should be limited to the treaties which are binding the States concerned, or be extended to appropriate customary norms or general principles of law. There is no

consensus among the doctrine as it concerns this question, although a large and growing number of scholars joins the opinion supporting the concept of an international legal obligation "*aut dedere aut judicare*" as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it concerns certain categories of crimes.[38]

41. Some of the authors try to prove the existence of such customary norms through general practice deriving from treaties:

> "... it is reasonable to assert that if a state has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula, then that state has demonstrated through this practice that *aut dedere aut judicare* is a customary norm. The state, through the act of signing related international agreements, articulates the belief that *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct. This belief satisfies the requirement of *opinio juris* when establishing customary norms. If a state accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law. By agreeing to the formula of *aut dedere aut judicare* in multiple treaties that are concerned with international offenses, a state has indicated that with respect to international offenses it believes that the best way to ensure compliance is to impose such an obligation."[39]

42. A careful and thorough evaluation of possible customary grounds for the obligation *aut dedere aut judicare* is necessary for a final definition of the legal nature of this obligation. The extent to which such a definition will be based on either the codification of international law or the progressive development of this law depends mostly on the possibility of finding solid grounds in generally accepted customary norms.

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[38] See M. Cherif Bassiouni, E. M. Wise, supra note 3; N. Roht-Arriza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", *California Law Review*, vol. 78 (1990), p. 451, at p. 466; noting that treaties imposing an *aut dedere aut judicare* obligation, "whether addressing international or national crimes, show an increasing tendency in international law to require states to investigate and prosecute offences". See also, Marc Henzelin, *Le principe de l'universalité en droit pénal: droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Bâle/Genève/Munich: Helbing & Liechtenhahn, Bruxelles: Bruylant, 2000); noting tendencies in the direction of a customary international law rule of *aut dedere aut judicare* with respect to certain crimes.

[39] C. Enache-Brown, A. Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law", *McGill Law Journal*, vol. 43 (1998), pp. 628 and 629.

C. National legislation and practice of States

43. When examining the question of sources from which the obligation to extradite or prosecute may derive, we should not limit ourselves to traditional sources of international law, like international treaties and customary rules, but extend our analysis to national legislation and the practice of States. This practice is very rich and worth considering in depth. Taking into account national legislation and practice in the sphere of universal jurisdiction, as well as the internal application by States of the *aut dedere aut judicare* principle, may be helpful for a better understanding of the way in which the traditional perception of this principle should be considered in the light of modern concepts of universal jurisdiction.

44. In this connection, as concerns internal legislation, there are numerous examples when the power to exercise universal jurisdiction is not limited to crimes under international law but is extended also to ordinary crimes found in the national law of most States. Almost two centuries ago, Austria became the first State, as far as is known, to have enacted legislation providing for universal jurisdiction over ordinary crimes under national law. It is worth recalling, for instance, that the Austrian Penal Code, following the 1803 legislation, includes provisions reflecting the principle *aut dedere aut judicare* in connection with universal jurisdiction. First, article 64.1.6 provides that certain crimes under Austrian law committed abroad are punishable under Austrian criminal law, regardless of the criminal law of the place where they occurred, when Austria is under an obligation to punish them. Secondly, article 65.1.2 of the Penal Code provides that courts may exercise universal jurisdiction over offences committed abroad, provided that (1) the acts are also punishable in the place where they are committed (double criminality requirement), (2) the suspect, if a non-national, is present in Austria and (3) he or she cannot be extradited to the other State for reasons other than the nature and characteristics of the offence. Crimes under international law are not political offences.[40]

45. Argentina was also among the States which had the earliest legislation providing for universal jurisdiction over all or most crimes in their penal codes and imposing an *aut dedere aut judicare* obligation with regard to foreigners found in its territory suspected of committing ordinary crimes abroad. Article 5 of the Argentinean extradition law adopted in 1885 provided:

> "In cases in which, under the provisions of this Act, the Government of the Republic is not bound to hand over the offenders requested, they shall be tried by the county's courts and sentenced to the penalties specified by law for crimes or offences committed within the territory of the Republic ..."[41]

46. Another interesting example of internal State practice — though applied many years later — may be found in the text of the reservation made by the Government of Belgium on 27 September 2001 (repeated on 17 May 2004) to the International Convention for the Suppression of the Financing of Terrorism of 1999, where it has been stated that:

> "Belgium recalls that it is bound by the general legal principle *aut dedere aut judicare*, pursuant to the rules governing competence of its courts."

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[40] Amnesty International, supra note 17, chap. 6, pp. 5 and 6.

[41] Amnesty International, supra note 17, chap. 4, p. 10.

47. Summing up what has been said here in a preliminary way about the sources of the obligation to extradite or prosecute, it seems to be obvious that the main stream of considerations concerning the obligation to extradite or prosecute goes through the norms and practice of international law. It cannot be forgotten, however, that "... efforts towards optimalization of the regulatory mechanism rooted in the principle *aut dedere aut judicare* may be undertaken either on the international level or on the domestic level".[42] Internal criminal, procedural and even constitutional regulations should be taken into consideration here on an equal level with international legal norms and practices.

48. Based on what has been said up to now, with regard to the preliminary plan of action, the Special Rapporteur is convinced that the sources of the obligation to extradite or prosecute should include general principles of law, national legislation and judicial decisions, and not just treaties and customary rules.

VI. Scope of the obligation to extradite or prosecute

49. The obligation to extradite or prosecute is constructed in the alternative giving a State the choice to decide which part of this obligation it is going to fulfil. It is presumed that after fulfilling one part of this composed obligation — either *dedere* or *judicare* — the State is free from fulfilling the other one. There is a possibility, however, that a State may wish to fulfil both parts of the obligation in question. For example, after establishing its jurisdiction, prosecuting, putting on trial and sentencing an offender, the State may decide to extradite (or surrender) such an offender to another State, also entitled to establish its jurisdiction, for the purpose of enforcing the judgment.

50. A detailed description of the obligation to extradite or prosecute differs significantly if we compare various international conventions formulating the principle *aut dedere aut judicare*. In the above-quoted Convention for the Suppression of Unlawful Seizure of Aircraft, the formulation applied was rather a simple one, providing that the contracting State in the territory of which the alleged offender is found, shall "if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution".[43] An analogous obligation, established for instance by the United Nations Convention against Corruption, signed in Merida, Mexico, on 9 December 2003, is much more elaborated:

> "A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution."

The substantive scope of the obligation to extradite or prosecute is also extended, as the Merida Convention provides in addition, in the same article, that:

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[42] M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", supra note 13, at p. 332.

[43] See supra para. 16.

"The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution."[44]

51. Although the International Law Commission in the quoted provision of the Draft Code of Crimes against the Peace and Security of Mankind has recognized the existence of the obligation in question, it has done it, however, exclusively in relation to a strictly limited and defined group of offences, described generally as crimes against the peace and security of mankind (with the exclusion of the "Crime of aggression"). In any case, this recognition may be considered as a beginning point for further considerations as to what extent this obligation may be extended to other kinds of offences.

52. Furthermore, it is worth noting that the Commission has introduced a concept of "triple alternative", considering a possibility of parallel jurisdictional competence to be exercised not only by interested States, but also by international criminal courts. It has been a significant step forward in the development of the traditional "alternative model" of the principle *aut dedere aut judicare*.

53. One of the earliest examples of such "third choice" may be found in the Convention for the Creation of an International Criminal Court, opened for signature at Geneva, on 16 November 1937. The said Court was intended to be established for the trial of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism from the same date.[45] In accordance with the provisions of article 2 of the first convention, the persons accused could be prosecuted either by a State before its own courts, or extradited to the State entitled to demand extradition, or committed for trial to the International Criminal Court. Unfortunately, the said Convention has never entered into force and the Court in question could not be established.

54. Alternative competences of the International Criminal Court, established on the basis of the Rome Statute of 1998, are generally known. The Statute gives a choice between exercising jurisdiction over an offender by the State itself or having him surrendered to the jurisdiction of the International Criminal Court.

55. In addition, there is already judicial practice, which deals with the said obligation and has confirmed its existence in contemporary international law. The *Lockerbie* case before the International Court of Justice has brought a lot of interesting materials in this field, especially through dissenting opinions of five judges to the decisions of the Court of 14 April 1992 "not to exercise its power to indicate provisional measures" as requested by the Libyan Arab Jamahiriya.[46] Although the Court itself was rather silent as it concerns the obligation in question, the dissenting judges have confirmed in their opinions the existence of "the

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[44] United Nations General Assembly resolution 58/4 of 31 October 2003, annex, art. 44, para. 11.

[45] For the texts of both conventions see, M. O. Hudson, editor, *International Legislation. A collection of the texts of multiple international instruments of general interest (1935-1937)*, vol. VII, No. 402-505 (Washington, 1941), pp. 862-893.

[46] Two identical decisions were adopted by the International Court of Justice concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Orders of 14 April 1992, *I.C.J. Reports* (1992), p. 3 and p. 114.

principle of customary international law *aut dedere aut judicare*"[47] and of "a right recognized in international law and even considered by some jurists as *jus cogens*".[48] These opinions, though not confirmed by the Court, should be taken into account when considering the trends of contemporary development of the said obligation.

56. As it was correctly noted in the doctrine and what should be followed in future codification work to be continued by the International Law Commission:

> "... the principle *aut dedere aut judicare* cannot be perceived as a panacea whose universal application will cure all the weaknesses and ailments that extradition has been suffering from for such a long time. (...) In order to establish *aut dedere aut judicare* as a universal rule of extradition, the efforts should be made to gain the acceptance of the proposition that first, such a rule has become an indispensable element of the suppression of criminality and bringing offenders to justice in an international arena, and second, that it is untenable to continue limiting its scope to international crimes (and not even all of them) as defined in international conventions."[49]

57. In the light of what has been said above, it has been decided by the International Law Commission that the topic of the "Obligation to extradite or prosecute (*aut dedere aut judicare*)" has achieved a sufficient substantial maturity for its codification, with a possibility of including some elements of progressive development. This developing nature of the obligation in question was also underlined by some scholars saying that:

> "The crystallization of an emerging rule of customary law that would oblige states to extradite or prosecute those reasonably suspected of international crimes should be therefore encouraged."[50]

VII. Methodological questions

58. The identification of legal rules concerning the obligation to extradite or prosecute that the international community will be ready to approve and follow, either as binding norms or as a "soft-law" instrument, requires an extensive and comprehensive work, including both international and national elements.

59. At this stage it seems premature to decide if the final product of the International Law Commission's work should take the form of draft articles, guidelines or recommendations. The Special Rapporteur will try, however, to formulate in subsequent reports draft rules concerning the concept, structure and operation of the principle *aut dedere aut judicare*, without any prejudice as it concerns their final legal form. However, it would be of high importance for the Special Rapporteur to obtain opinions of other members of the Commission about the final form of the work undertaken now on the topic in question.

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[47] Ibid., p. 51 (Judge Weeramantry, dissenting opinion).
[48] Ibid., p. 82 (Judge Ajibola, dissenting opinion).
[49] M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", supra note 13, at p. 364.
[50] B. Broomhall, supra note 32, at p. 406.

60. The International Law Commission could address a written request for information to member States. It would welcome any information Governments may wish to provide concerning their practice with regard to this topic, particularly dealing with more contemporary practice. Any further information that Governments consider relevant to the topic would be also welcome by the Commission and by the Special Rapporteur. In particular, such information should deal with:

(a) International treaties by which a given State is bound, containing the obligation to extradite or prosecute, and reservations made by the State to limit the application of the obligation to extradite or prosecute;

(b) Internal legal regulations, adopted and applied by a given State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or to prosecute;

(c) Judicial practice of a given State reflecting the application and its extent, or non-application, of the principle of universal jurisdiction and obligation *aut dedere aut judicare*;

(d) To what crimes/offences the principle of universal jurisdiction and the obligation *aut dedere aut judicare* are applied in the legislation/practice of a given State;

(e) What obstacles a given State meets, both in international and internal forums, having a negative impact on the possible application of:

– Universal jurisdiction;

– The principle *aut dedere aut judicare*.

VIII. Preliminary plan of action

61. In the light of the preliminary observations made above, the main 10 points to be considered at the beginning by the Commission could be as follows:

(1) First of all, there is a necessity of a comprehensive comparative analysis of appropriate provisions concerning the obligation to extradite or prosecute, contained in the relevant conventions and other international instruments, together with a systematic identification of existing similarities and differences. Although there were attempts to collect and systematize such international instruments, updating appropriate information may be of paramount importance for the subsequent effective work of the International Law Commission.

(2) The above-mentioned analysis should include the presentation of the evolution and development of the obligation to extradite or prosecute — from the "Grotius formula" to the "triple alternative":

(a) Extradite or punish;

(b) Extradite or prosecute;

(c) Extradite or prosecute or surrender to international court.

(3) Secondly, since the principle *aut dedere aut judicare* appears to be assimilated in many internal legislations, it should be necessary to make another

systematic collection, i.e. gathering appropriate legal provisions elaborated and adopted in this field by individual States, together with available practice of their application. Similarities and differences, existing between such national legislations and practices should be identified, as well as the possible impact of international regulations on national legislations (and vice versa).

(4) The third important step, taking into account what has been said before about the sources of the obligation to extradite or prosecute, would be the necessity to establish the actual position of the obligation in contemporary international law, either:

(a) As deriving exclusively from international treaties; or

(b) As rooted also in customary norms — then taking into account possible consequences of their customary status.

There is also the possibility of a mixed nature of the obligation in question when, for instance, *dedere* derives from conventional commitments, while *judicare* may be based on customary norms (or vice versa).

(5) The fourth initial task shall be to establish as precisely as possible the existing mutual relationship and interdependence between the principle of universal jurisdiction and the obligation of *aut dedere aut judicare*.

(6) One of the most decisive factors to be established is the extent of the substantive application of the obligation to extradite or prosecute, either:

(a) To "all offences by which another State is particularly injured" (Grotius); or

(b) To a limited category or categories of offences/crimes (e.g., to the "crimes against the peace and security of mankind", or to "international offences", or to "crimes under international law", or to "crimes under national law of international concern", etc.).

Identifying the possible criteria of qualifying such offences would be of high importance.

(7) The content of the obligation to extradite or prosecute should be identified and analysed, taking into account its complex and alternative nature, including both:

(a) Obligations of States (*dedere* or *judicare*):

(i) Extradition: conditions and exceptions,

(ii) Jurisdiction: grounds for establishing, and

(b) Rights of States (in case of application, as well as of non-application of the obligation in question).

It has to be decided by the International Law Commission to what extent *dedere* and *judicare* shall be treated as alternative obligations of States, and when they may be considered as rights or competences of States.

(8) Mutual relation between the obligation to extradite or prosecute and other rules concerning jurisdictional competences of States in criminal matters

should find its place in the analysis conducted by the Commission, including such questions as:

(a) "Offence-oriented" approach (e.g., article 9 of the Draft Code of Crimes against the Peace and Security of Mankind; article 7 of the 1970 Hague Convention);

(b) "Offender-oriented" approach (e.g., article 6, paragraph 2, of the 1957 European Convention on Extradition);

(c) Principle of universality of jurisdictional competences:

(i) As exercised by States;

(ii) As exercised by international judicial organs.

(9) Legal nature of particular obligations deriving under international law from the application of the obligation to extradite or prosecute should be defined, while paying special attention to:

(a) Equality of alternative obligations (extradite or prosecute), or a prevailing position of one of them (hierarchy of obligations);

(b) Possible limitations or exclusions in fulfilling alternative obligations, (e.g., non-extradition of own nationals, political offences exception, limitations deriving from human rights protection, etc.);

(c) Possible impact of such limitations or exclusions on another kind of obligation (e.g., impact of extradition exceptions on alternatively exercised prosecution);

(d) The obligation in question as a rule of substantive or procedural character, or of a mixed one;

(e) Position of the obligation in question in the hierarchy of norms of international law:

(i) Secondary rule;

(ii) Primary rule;

(iii) *Jus cogens* norm (?).

(10) Relation between the obligation to extradite or prosecute and other principles of international law (e.g., principle of sovereignty of States, principle of human rights protection, principle of universal suppression of certain crimes, etc.), as well as the impact of these principles on the extent of application of the obligation, also have to be taken into account by the International Law Commission when analysing the topic in question.

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